

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-144996-001 DT

01/27/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

ADAM M SUSSER

v.

ISMAEL ARMANDO RODELA (001)

C DANIEL CARRION

MESA JUSTICE CT-WEST
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2010-144996-001.

Defendant-Appellant Ismael Armando Rodela (Defendant) was convicted in West Mesa Justice Court of driving under the influence. Defendant contends the trial court erred in denying his motion for judgment of acquittal. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On August 20, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1); and false reporting, A.R.S. § 13-2907. At trial, Officer Charles Burnett testified he was employed by the Scottsdale Police Department, and he was on duty on August 20, 2010, at 2:30 a.m., northbound on Hayden Road waiting to turn left to go west on Indian School Road. (R.T. of Apr. 22, 2011, at 62-64.) He saw a dark colored Mustang without its lights on headed east on Indian School Road. (*Id.* at 65-66.) Once he received a green arrow and made his left turn, he headed west, made a u-turn, and caught up to the Mustang just east of the Loop 101. (*Id.* at 65-67.) He initiated a traffic stop and illuminated the vehicle with his two spotlights. (*Id.* at 67, 77.) As he approached the driver's side, he saw the two occupants exchanging seats, with the original driver climbing into the back seat, and the original passenger moving into the driver's seat. (*Id.* at 67-68.) He identified Defendant as the person who was now in the driver's seat. (*Id.* at 70, 79.) It appeared the driver's seat was too far forward for Defendant because he was shifting his weight around and appeared cramped. (*Id.* at 69, 91.) Defendant had his foot on the brake pedal because the brake lights were on. (*Id.*) Officer Burnett identified himself as a Scottsdale Police Officer, and Defendant rolled down the side window. (*Id.* at 70.) The engine was running and Defendant had his

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hands on the steering wheel. (*Id.* at 71, 78, 79.) Officer Burnett did not see the ignition key, but he testified it would have had to have been in the ignition for the engine to be running. (*Id.* at 71–72.) Officer Burnett told Defendant he had seen the two of them changing places, and Defendant said he had been driving the entire time. (*Id.* at 72, 73.) Officer Burnett told Defendant he had stopped the vehicle because the headlights were off and Defendant denied they were off, but when Defendant checked, he saw they were off, so he turned them on. (*Id.* at 74–75.)

Officer Robert Rowley testified he investigated Defendant for a DUI. (R.T. of Apr. 22, 2011, at 114, 117–32.) Because Defendant did poorly on the tests, Officer Rowley arrested him for DUI. (*Id.* at 132.) Criminalist Jennifer Valdez testified Defendant had a BAC of .164. (*Id.* at 137–39.)

After the State rested, Defendant made a motion for judgment of acquittal. (R.T. of Apr. 22, 2011, at 152.) After hearing the arguments of counsel, the trial court denied that motion. (*Id.* at 155–56.) The jurors subsequently found Defendant guilty of A.R.S. § 28–1381(A)(1) & (A)(2), and A.R.S. § 28–1382(A)(1). (*Id.* at 226.) The trial court then imposed sentence. (*Id.* at 228–31.) Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE STATE PRESENT SUFFICIENT EVIDENCE SO THAT THE TRIAL COURT
CORRECTLY DENIED DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL.

Defendant contends the State did not present sufficient evidence that he was in physical control of the vehicle, and thus contends the trial court erred in denying his motion for judgment of acquittal. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). In the present case, the issue Defendant presents is whether the trial court erred in denying the motion for judgment of acquittal and not whether the jurors were correct in finding Defendant guilty. Thus, the issue this Court must resolve is whether the trial court was correct in concluding the State presented sufficient evidence that, if believed, would allow the jurors to find Defendant guilty beyond a reasonable doubt.

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The statutes in question make it unlawful “to drive or be in actual physical control” of a vehicle while under the influence of intoxicating liquor. Defendant concedes he was under the influence of intoxicating liquor, and the evidence showed he was not driving the vehicle, thus the only issue was whether he was “in actual physical control” of the vehicle. The Arizona Supreme Court has given the following instruction to determine whether a defendant was in actual physical control of a vehicle:

In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant’s current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. Whether the vehicle was running;
2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle’s headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioner was on;
12. Whether the windows were up or down;
13. Any explanation of the circumstances shown by the evidence.

State v. Zaragoza, 221 Ariz. 49, 209 P.3d 629 (2009). Viewing the evidence the State presented during its case-in-chief shows the following.

1. *Whether the vehicle was running.* The evidence presented was Defendant switched places with his friend who had been driving the vehicle, but the engine was running when Officer Burnett approached and questioned Defendant. (R.T. of Apr. 22, 2011, at 71, 78.) In addition, Defendant had his hands on the steering wheel and his foot on the brake pedal. (*Id.* at 69, 71.)

2. *Whether the ignition was on.* The ignition was on, but Defendant later turned it off. (*Id.* at 72, 75, 79, 97.)

3. *Where the ignition key was located.* Officer Burnett testified the ignition key had to have been in the ignition because the engine was running. (*Id.* at 71–72.)

4. *Where and in what position the driver was found in the vehicle.* Defendant was in the driver’s seat. (*Id.* at 69–70, 79.)

5. *Whether the person was awake or asleep.* Defendant was awake. (*Id.* at 70–72, 79.)

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6. *Whether the vehicle's headlights were on.* Initially headlights were off, but Defendant turned them on once Officer Burnett told him they were off. (*Id.* at 74–75, 79, 95.)

7. *Where the vehicle was stopped.* The vehicle was stopped at side of the roadway. (*Id.* at 68, 77, 79, 99.)

8. *Whether the driver had voluntarily pulled off the road.* Defendant's friend pulled the vehicle off roadway as the result of the traffic stop, and then Defendant got into the driver's seat. (*Id.* at 67, 80.)

9. *Time of day.* The stop occurred at 2:30 a.m. (*Id.* at 64, 80.)

10. *Weather conditions.* The weather was clear. (*Id.* at 89.)

11. *Whether the heater or air conditioner was on.* Defendant never touched the air conditioner controls. (*Id.* at 94.)

12. *Whether the windows were up or down.* The side window was up, but Defendant rolled it down once Officer Burnett approached to question him. (*Id.* at 70, 80–81, 96.)

13. *Any explanation of the circumstances shown by the evidence.* Because Defendant's issue is whether the State presented sufficient evidence, the question focuses on what the State presented prior to when the trial court ruled on Defendant's motion for judgment of acquittal, and not on what evidence might have been presented later of any explanation. During the State's case-in-chief, there was no evidence of Defendant's explanation of the circumstances.

This Court concludes the above evidence was sufficient to support the trial court's ruling that the State presented sufficient evidence from which the jurors could conclude beyond a reasonable doubt that Defendant was in actual physical control of the vehicle. Defendant was conscious, and actually did control the vehicle by (1) stepping on the brake pedal, (2) rolling down the window, (3) turning on the headlights, and (4) turning off the ignition. Further, because the engine was running and Defendant had his hands on the steering wheel, Defendant could have driven off at any time merely by taking his foot off the brake pedal and stepping on the accelerator. The trial court therefore correctly denied Defendant's Motion for Judgment of Acquittal.

Defendant contends the State failed to present any evidence that he posed a threat to the public under the totality of circumstances analysis. Defendant seems to contend that posing a threat to the public is an element the State must prove. The statute does not contain any element of posing a threat to the public, and neither the Arizona Supreme Court nor Defendant has the authority to add such an element to the statute. The posing a threat to the public language appears to be the method by the Arizona Supreme Court of accommodating those individuals who realize they are too drunk to drive and choose to pull off the road and stop driving until such time as they have sobered up enough to drive without violating the DUI statutes. But that is not what happened here. Defendant was in the driver's seat with his hands on the steering wheel of a vehicle with the engine running. In *Zaragoza*, the defendant had just entered the vehicle and was

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in the driver's seat with one hand on the steering wheel, but had not yet started the vehicle, yet the Arizona Supreme Court affirmed his conviction for driving under the influence. Because Defendant could have taken off at any time, he if anything posed more of a threat to the public than did the defendant in *Zaragoza*.

Defendant contends his intent was merely to deceive the officer about who was driving rather than to drive, and thus did not cause a threat to the public. This argument fails for four reasons. First, as stated by the Arizona Supreme Court, "The defendant's intent is not an element of the strict liability offense of driving while intoxicated." *Zaragoza* at ¶ 20. Second, the issue is whether the trial court erred in denying Defendant's motion for judgment of acquittal made at the close of the State's case, and the only testimony of Defendant's statements presented during the State's case-in-chief was that Defendant said he was the one who had driven the vehicle that night. (R.T. of Apr. 11, 2011, at 72, 125.) Third, the only testimony about Defendant's intent was presented during Defendant's case-in-chief, which was after the trial court had ruled on Defendant's motion for judgment of acquittal. (*Id.* at 157–60, 164, 166.) And fourth, the circumstantial evidence of the condition on the vehicle indicated Defendant could have changed his mind and driven off, thereby causing a threat to the public.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly denied Defendant's Motion for Judgment of Acquittal.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the West Mesa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the West Mesa Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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